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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5672

ROGER COLLINS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Georgia

MARSHALL W. KRAUSE,
KRAUSE, TIMAN, BASKIN, SHELL & GRANT
Wood Island, Suite 207
60 E. Sir Francis Drake Blvd.
Larkspur, CA 94939
Telephone: (415) 461-4100

Attorneys for Petitioner.

QUESTIONS PRESENTED

1. Can this case be distinguished from Sandstrom v. Montana, 442 U.S. 510 (1979) where an instruction almost identical to the one given in this case—"a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts"—was condemned by a unanimous Court as interfering with the constitutionally required standard of proof in a criminal case?

2. On remand, did the Supreme Court of Georgia fail to understand and properly apply the decision of this Court in Godfrey v. Georgia, 446 U.S. ___ (1980)?

3. Does the Georgia law, as applied in this case, allow the arbitrary and capricious application of the death penalty condemned in Furman v. Georgia (1972) 408 U.S. 238?

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PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Georgia

Petitioner Roger Collins respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia affirming his convictions for the crimes of murder and rape and affirming the death sentence for murder.

OPINIONS BELOW

The first opinion of the Supreme Court of Georgia is attached hereto as Appendix A and reported as Collins v. State (1979) 243 Ga. 291, 253 S.E.2d 729. It was filed on March 6, 1979. A timely Petition for Rehearing was denied on March 27, 1979 (Appendix B). On May 27, 1980, this Court entered the following Order in Collins v. Georgia, No. 79-5188:

> The motion of petitioner for leave to proceed in forma pauperis and the Petition for writ of certiorari is granted. The judgment is vacated insofar as it leaves undistubed the

death penalty imposed and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. ___ (1980).

The second opinion of the Supreme Court of Georgia, from which certiorari is now petitioned, is Collins v. State, 246 Ga. ___, ___ S.E.2d ___ (September 8, 1980), attached hereto as Appendix C. No rehearing was sought.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The second opinion of the Supreme Court of Georgia was filed on September 8, 1980 (Appendix C).

So far as is known to petitioner's counsel[1] there has been no execution date scheduled for petitioner. The judgment of the trial court was that petitioner "shall suffer the penalty of death by electrocution between the hours of 10:00 a.m. and 2:00 p.m. on the 15th day following the receipt and filing of the remittur of the Georgia Supreme Court with this Court, and may the Lord have mercy on your soul." (R.T. 388.)

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[1] Petitioner's present counsel was contacted by the NAACP Legal Defense and Education Fund, Inc. and informed that no attorney in Georgia could be found to carry the case further than the Georgia Supreme Court. Petitioner's counsel has been unable to interview his client personally.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the Constitution of the United States reads:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflected.

The Fourteenth Amendment to the Constitution of the United States reads in pertinent part:

> *** No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The Georgia death penalty law is set forth in Appendix D to this Petition.

QUESTIONS PRESENTED

1. Can this case be distinguished from Sandstrom v. Montana, 442 U.S. 510 (1979) where an instruction almost identical to the one given in this case—"a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts"—was condemned by a

unanimous Court as interfering with the constitutionally required standard of proof in a criminal case?

2. On remand, did the Supreme Court of Georgia fail to understand and properly apply the decision of this Court in Godfrey v. Georgia, 446 U.S. ___ (1980) and in particular in the following respects:

A. By not remanding to the trial court for a new sentence hearing when the jury instruction at petitioner's sentencing trial was in the statutory language of Georgia Code Annotated, § 27-2534.1(b)(7) without otherwise channeling or narrowing the jury's discretion?

B. By failing to adopt a limiting or narrowing construction of Georgia Annotated Code § 27-2534.1(b)(7) as required to avoid the arbitrary and capricious application of the death penalty condemned in Furman v. Georgia (1972) 408 U.S. 238 and Godfrey v. Georgia, 446 U.S. ___ (1980)?

C. By denying to petitioner's counsel the right to present any argument in writing or orally after the remand?

D. By reaffirming the death penalty on petitioner on the independent ground that the jury found a second statutory aggravating circumstance to exist under Georgia Code Annotated, § 27-2534.1(b)(2) where

(1) The record does not disclose what the jury might have done on the death penalty issue had it believed only one aggravating circumstance was present.

(2) The record does not disclose if the jury verdict on the aggravating circumstances was unanimous that both aggravating circumstances were proven or merely on the question that one or more aggravating circumstances was proven.

(3) Where the commission of the felony which forms the basis for the aggravating circumstance under Georgia Code Annotated, § 27-2534.1(b)(2) is the same felony which serves as the basis for the felony-murder rule in Georgia allowing petitioner to be convicted of first degree murder without evidence of premeditation or deliberation.

3. Does the Georgia law, as applied in this case, allow the arbitrary and capricious application of the death penalty condemned in Furman v. Georgia (1972) 408 U.S. 238 where

A. A more culpable co-defendant was sentenced to life imprisonment for the exact same crimes for which petitioner has been condemned to death (Durham v. State (1979) ___ Ga. ___, 254 S.E.2d 359)?

B. The Georgia Supreme Court's sentence review mandated in Gregg v. Georgia (1976) 428 U.S. 153 ignored its own precedent which holds that when a more culpable defendant receives life imprisonment, the sentence of another defendant in the same murder case must likewise be reduced from death to life imprisonment (Hall v. State (1978) 241 Ga. 252, 244 S.E.2d 833)?

C. An alleged aggravating circumstance—that the offense of murder was committed while the defendant was engaged in the commission of rape—was capriciously applied where the rape, if proven, was completed well before the murder ensued; and

D. The rape was required by the Georgia Legislature to be a "capital felony" but the rape, if proven, was no longer a capital crime at the time it was accomplished by defendant?

E. The objective facts in the case do not indicate that the murder was extreme or aggravated?

F. Defense counsel entirely fails to present even an arguably adequate background of a defendant already convicted of first degree murder and pleading for his life before a jury, omitting, among other things, the fact that the 18 year old black, uneducated defendant had no criminal record whatsoever, and any information concerning his family and friends?

STATEMENT OF THE CASE

Petitioner was charged by Grand Jury indictment with the rape and murder of Dolores Lois Luster on August 7, 1977. Co-defendant William Durham was also charged with the same crimes, but tried separately. J.C. Styles was charged with the rape but was granted immunity from prosecution in return for his testimony against petitioner and Durham. Durham was tried after petitioner, found guilty of both crimes, and given a sentence of life imprisonment.[2]

Very little is in this record concerning petitioner. He was 18 at the time of the trial (R.T. 349) which was held November 14 through 17, 1977 (two trial days, after the first day of jury selection, including the separate jury trial on sentencing). Petitioner's education stopped with a portion of the eighth grade (R.T. 349). He had no criminal record whatsoever (R.T. 394). Petitioner did not testify at the guilt phase of his trial, but did testify at the penalty phase

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[2] The trial court granted a motion to make the transcript of the evidence in Durham's case available to petitioner (R. 67) and this transcript is evidently part of the exhibits which were before the Georgia Supreme Court. Georgia Annotated Code, § 27-2537(c)(3) requires the Supreme Court of Georgia to consider: "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(R.T. 349-355). During petitioner's penalty-phase testimony he denied killing Dolores Luster, testified that the killing was done by William Durham and that William Durham placed him in fear for his life.[3] He did not deny being at the scene of the rape and the murder.

On the night of August 6, 1977 petitioner, Durham and Styles were engaged in driving through their local neighborhood for social reasons.[4] Styles had known petitioner for about a year and had known Durham for all his life since they were first cousins.[5] All three were regular acquaintances of the victim, Dolores Luster. Petitioner propositioned a sexual act from the victim. She declined but willingly entered the car for the purpose of being taken home. Durham was driving and was seated in the front seat with the victim. Petitioner and Styles were in the back seat. Several stops were made for minor purchases. There was no evidence that the victim was under compulsion.

Durham drove to an isolated pecan orchard and "snatched" the victim out of the car and started taking off her blouse. The victim then took off the rest of her clothes. Although there was no testimony concerning threats to the victim, the jury may have believed that she was intimidated

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[3] Petitioner was poorly prepared for his testimony. His points were awkwardly and unclearly made. We do not know the degree of experience of his counsel but it is obvious that the denial of guilt, coming for the first time at the penalty phase, was ill-timed.

[4] This and other narrative about the crime comes from the testimony of Styles who testified for the prosecution as the only witness to most of these events. (R.T. 82-177.) The testimony of Styles was said to be "virtually identical" in the subsequent trial of Durham. Durham v. State (1979) ___ Ga. ___, 254 S.E.2d 359, 361.

[5] This clear motive for bias was not brought out by petitioner's defense counsel.

into having sexual intercourse with the petitioner.[6] While this act was going on, Durham was telling Styles about other people he had killed. (R.T. 112; This testimony was objected to as hearsay but the Court allowed it as part of the res gestae. R.T. 111.) At the same time Durham was threatening Styles with a knife.

Durham then forced Styles to attempt to have sex with the victim. Then Durham had sex with the victim while threatening her with the knife and striking her in the head (R.T. 116). There is no testimony that petitioner had a weapon or was violent with the victim at this time.

After Durham left the victim he conferred with petitioner and was heard to say to petitioner, "Won't nobody else see her no more." (R.T. 118.) Then Durham, holding the knife in one hand, took the victim in his other hand and walked with her out of Styles' view. Petitioner went to the car, took a jack handle out of the trunk and followed Durham and the victim.[7] Styles then heard the sound of a bludgeoning but did not see anything. Durham came back holding a bloody jack handle and Styles heard petitioner say that he had hit the victim on the side of the head and that he had killed other people. (R.T. 122.) The jack handle was recovered with petitioner's fingerprint on it. The body of the

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[6] Petitioner denied that there was a rape to the judge (R.T. 394), but did not defend himself against the rape charge at either the trial or sentencing phase. See note 3, supra, and petitioner's argument on inadequacy of counsel, infra.

[7] Petitioner's pre-trial statement was that Durham had ordered him to bring the jack handle (R.T. 434) but petitioner's counsel failed to ask Styles whether he had heard this conversation.

victim was recovered the next day after Styles had informed the police of the events.

Petitioner was informed of his Miranda rights after his arrest, claimed to have understood them, and gave a statement that he had participated in the killing. A later and fuller statement (R.T. 429, et seq.) substantiated much of Styles' testimony except that it stated that Durham had done the killing and petitioner had not. (R.T. 434.)

At petitioner's trial he presented no defense whatsoever as to whether he was guilty of first degree murder with the requisite intent. After the jury returned a verdict of guilty on all charges against petitioner, the penalty phase commenced. The State of Georgia introduced no additional evidence but the defense called petitioner to the stand.

Petitioner's testimony on direct and cross at the penalty phase was extremely brief (R.T. 349-355). Even though the jury had already found him guilty of first degree murder he testified that he did not kill Dolores Luster. He attended school to the eighth grade in Melbourne, Florida, worked at two jobs for short periods, had been living with a woman who had children of her own. He testified that he had known the victim for a long time and had no reason to kill her. In answer to leading questions from his counsel he testified that he had trouble sleeping at night and wanted the jury to spare his life.

The jury never learned anything about his parents, his brothers or sisters, his upbringing, his plans, his skills, his attitude toward other human beings or anything else that might have lead to the establishment of his humanness. There were no witnesses for the defense from family, friends, or experts concerning his mental qualifications and health.

After closing arguments, the Court instructed that under Georgia law the Court could not impose the death penalty unless it was specifically recommended by the jury and the jury could not recommend this penalty unless it determined beyond a reasonable doubt that "one or more" (R.T. 377) aggravating circumstances were present at the time the murder was committed.

The jury was instructed that two aggravating circumstances were possible, one that the murder was committed "while the defendant was engaged in the commission of a rape" and second that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." (R.T. 377.) The jury was told they had already received a definition of rape at the guilt trial, but received no explanation whatsoever of the meaning of the second aggravating circumstance. The jury was also instructed to consider mitigating circumstances (the defendant's age was the only one suggested to the jury) and was instructed that even if it did find beyond a reasonable doubt that aggravating circumstances existed, it could still recommend life imprisonment. The jury was not instructed that it must be unanimous as to each aggravating circumstance it found to exist in order to return a death penalty on that aggravating circumstance. The jury verdict stated (R.T. 383):

> Sentence Phase Verdict. We, the jury, recommend the death penalty, and find the following statutory aggravating circumstances: 1, the offense of murder was committed while defendant was engaged in the commission of rape; 2, the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture or depravity of the mind. This 17th day of November, 1977, Jimmie R. Thorn, Foreman.

On automatic appeal, the convictions of petitioner and his sentence were affirmed by the Supreme Court of Georgia (Appendix A). The same counsel who represented petitioner at trial represented him on appeal. After reversal and remand by this Court, the conviction and sentence were re-affirmed on the basis that:

> . . . The evidence supports a reasonable trier of facts in finding beyond a reasonable doubt that appellant's murder of the victim was "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." Code Ann. § 27-2534.1(b)(7). [Appendix C.]

Godfrey v. Georgia, supra, was distinguished on factual bases. Alternatively, the Georgia Supreme Court held that the penalty could also be reaffirmed on the basis of the second aggravating circumstance, commission in the course of a rape.

On June 3, 1980 petitioner's counsel wrote to the Justices of the Supreme Court of Georgia requesting that he be given an opportunity to file a supplemental brief and argue the case orally. No answer to this letter was ever received. An Affidavit of Counsel is attached to this Petition as Exhibit E and herein incorporated to support these points.

REASONS FOR GRANTING THE WRIT

This case, and undoubtedly others,[8] present this Court with the question of whether Georgia's death penalty law which was ruled valid on its face in Gregg v. Georgia, 428 U.S. 153, is being unconstitutionally applied in the Georgia courts. This Court assumed in Gregg that the room for arbitrariness and inequality in the Georgia death penalty law could violate the constitutional standards of Furman v. Georgia, 408 U.S. 238, unless cured by a discretion "suitably directed and limited." 428 U.S. 153, 189 (Opinion of Stewart, Powell and Stephens, J.J.). In Godfrey v. Georgia, supra, six members of this Court found that the Georgia Supreme Court had failed to narrow sentencing standards within constitutional limits and reversed the death sentence. The Georgia Supreme Court chose to interpret Godfrey and the other cases remanded in its wake as calling for a new factual evaluation of each homicide to determine if it fit within the wording of the aggravating circumstance of the Georgia law involved, whether the crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Georgia Code Annotated § 27-2534.1(b)(7). On remand, the Georgia Supreme Court found factual distinctions between Godfrey and all of the other cases, including that of petitioner and reaffirmed the death sentences in all the other cases.

It is apparent to petitioner that the Georgia Supreme Court has failed to understand Godfrey v. Georgia and has

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[8] Other cases remanded by this Court for consideration in the light of Godfrey v. Georgia were treated similarly to Collins by the Georgia Supreme Court.

applied it in a way which deprives petitioner of his constitutional rights in a death penalty case. The same arbitrariness condemned in Furman is still present in this record.

There is also in this case at least one major constitutional error based upon a recent decision of this Court and we take up that point first.

I

THE TRIAL COURT'S INSTRUCTION CONCERNING PRESUMED INTENT DEPRIVED PETITIONER OF HIS DUE PROCESS RIGHT TO REQUIRE THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT

In charging the jury in this case the trial court stated (R.T. 329):

> Malice is an essential ingredient in murder as charged in Count II of this indictment and it must exist before the homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred. It is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. [Emphasis added.]

Earlier the trial court had instructed the jury concerning intention as follows (R.T. 327):

> A presumption is a conclusion which the law draws from given facts. Each of the following presumptions that I am going to give you is rebuttable; that is, each is subject to being overcome by evidence to the contrary. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the trier of facts may find such intention upon consideration of the acts, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is tried. [Emphasis added.]

This method of proving intention by a presumption is the same method found unconstitutional by a unanimous Court in Sandstrom v. Montana, 442 U.S. 510, 47 L.W. 4719. Sandstrom had been convicted of murder after the trial court had instructed the jury that, "[T]he law presumes that a person intends the ordinary consequences of his voluntary acts." This Court held the instruction unconstitutional.

There was no evidence whatsoever in this case that petitioner intended to kill the victim. No witness to the killing testified, thus the jury was forced to rely upon circumstantial proof for this vital element of the prosecution case. The jury was told that the intention to kill could be created by the presumption that one intends the natural and probable consequences of his acts.[9] The jury might well have decided that the mere act of petitioner retrieving the jack handle and walking toward the victim and Bill Durham with it was sufficient to show his intention that the jack handle be used to murder the victim without any further evidence. The jury might have neglected the defense of duress[10] because intention was presumed and there was no testimony to the contrary. The jury was told that this presumption was a conclusion which the law draws unless it is rebutted. Since the defendant did not testify or offer any evidence, the jury obviously could not find that the presumption had been rebutted.

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[9] The definition of "presumption" given by the trial court to the jury was as follows:

> A presumption is a conclusion which the laws draws from given facts. [R.T. 327].

A "conclusion" is of course the final result or decision, a term of great consequence for a jury.

[10] Evidently, defense counsel did not request an instruction to the jury on the defense of duress even though Durham had threatened both the deceased and Styles with a switch-blade knofe and had it with him at the murder scene. Petitioner's testimony at the penalty phase was that Syles put him in fear. R.T. 351; See also R.T. 434, 438-39.

As this Court points out in Sandstrom, to require the defendant to come forward with evidence on this issue shifts the burden of persuasion to the defendant on the element of intent.[11] This Court concluded in Sandstrom that whether the defective jury instruction was interpreted either as a mandatory or permissive presumption, it was constitutionally erroneous because it interfered with the requirement that the accused be convicted on proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 385 (1970).

There was no objection to the unconstitutional instruction in the trial court in our case. Neither was it brought to the attention of the Supreme Court of Georgia in petitioner's first case.[12] This is probably because the Sandstrom case was not decided until well after the Supreme Court of Georgia first ruled in this case. Petitioner has raised the Sandstrom point at the first opportunity and the error was a fundamental one affecting the fairness of his trial.

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[11] Footnote 7 of the Sandstrom opinion holds that instructions regarding the general burden of proof and the presumption of innocence do not clear the error. The jury might well have concluded that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.

[12] After the remand, the Supreme Court of Georgia was informed of the Sandstrom pint and served with a copy of petitioner's first certiorari petition which raised it. See Appendix E. The Supreme Court of Georgia declined to allow oral or written argument on the point.

II

THE GEORGIA SUPREME COURT FAILED TO UNDERSTAND AND APPLY THE DECISION IN GODFREY v. GEORGIA, 446 U.S. ___ (1980) AS REQUIRED BY THIS COURT'S REMAND

On May 27, 1980, this Court vacated the previous judgment of the Georgia Supreme Court as to the death penalty issue and remanded for consideration under Godfrey v. Georgia. The Georgia Supreme Court did give further consideration to the death penalty issue. It examined the facts of this case and compared them with the facts involved in Godfrey v. Georgia. See Appendix C. The Georgia Supreme Court found "material differences" between Godfrey and this case, namely that the victim was not related to petitioner, was not threatening petitioner or causing him any emotional trauma, petitioner left the scene of the crime and attempted "in every manner" to avoid prosecution, and that the evidence of the victim's sexual abuse prior to the crime indicates that torture was present and that the petitioner had a "depraved mind." Thus the Georgia Supreme Court held that the jury was authorized to find that the conditions of Ga. Ann. Code § 27-2534.1(b)(7) were satisfied, curing any defect in the death penalty process arising from Godfrey. The Georgia Supreme Court also found it could independently uphold the death penalty on the basis that a rape was committed which authorized the jury to impose the death sentence as an aggravating circumstance of Ga. Ann. Code § 27-2534.1(b)(2).

Petitioner will not at this time attempt to contradict the Georgia Supreme Court's reading of the record, although he reserves the right to do so and believes that the Georgia Supreme Court read the record in an arbitrary and capricious manner and in a manner lacking evidentiary basis. Rather, petitioner will show that the Georgia Supreme

Court failed to obey the mandate of this Court thus depriving him of due process of law.

A. The Georgia Supreme Court Failed To Examine the Question of Whether the Sentencing Authority—The Jury—Received An Appropriately Narrowing Construction of Aggravating Circumstance (7).

The point of Godfrey v. Georgia, not appreciated by the Georgia Supreme Court, is that to implement the federal constitutional command that the death penalty shall not be imposed in an arbitrary and capricious manner, the sentencer must be acting within the confines of a law which forbids such imposition. Under Godfrey in death cases the State has the responsibility to do these things:

1. Tailor and apply its sentencing law in a manner which avoids the arbitrary and capricious infliction of the death sentence.

2. Define the crime to eliminate standardless sentencing discretion.

3. Channel the sentencer's discretion by clear and objective standards.

4. Provide specific and detailed guidance so that the process for imposing a sentence of death is rationally reviewable by an appellate court. Godfrey v. Georgia, supra, 48 L.W. at 4543.

This Court made it clear in Godfrey that mere appellate review of a decision of a jury instructed only in the language of aggravating circumstance (7) would not cure the error of failing to guide the jury as to the meaning of the terms of § (b)(7). 48 L.W. at 4544. (Plurality opinion, concurred in by Justices Brennan and Marshall). Even under Georgia law, clarifying instructions are required.

See Gates v. State (1979) 244 Ga. 587, 261 S.E.2d 349, 357.

In petitioner's case, the jury was instructed only in the language of § (b)(7) and received no other guidance. The jury was the sentencer. Therefore, no matter how narrow the reading of § (b)(7) by the Georgia Supreme Court, the sentencing process still deprived petitioner of due process of law. See R.T. 376.

It is true that the jury might have understood the meaning of § (b)(7) to be exactly as it was understood by the Supreme Court of Georgia. However, such an understanding is speculative and highly unlikely. It is much more probable that the jury understood the terms of § (b)(7) not as a channel but as a flood plain allowing wide discretion in deciding whether or not the aggravating circumstance existed. It is the jury which has the original discretion on the sentence under Georgia law and it is the jury which must be given a narrowing construction under Gregg, Furman and Godfrey.

In the event it is argued that the jury received some guidance or channelling from counsel, we have examined the closing arguments on the death penalty issue. R.T. 356-376. There was not one attempt by either counsel to explain the vague, oberbroad generalities of § (b)(7). Indeed, any such attempt would have been both futile and dangerous. Dangerous because the words are capable of such wide and diverse understanding that any definition might be likely to lose the vote of a juror who was giving a particular epithet a different meaning. Futile because the trial judge, whose instructions were known to counsel in advance, was giving no definition of the terms of § (b)(7) to the jury thus inviting the very arbitrariness condemned some seven years earlier in

Furman.[13]

B. The Georgia Supreme Court Failed to Adopt A Narrowed Construction of Section (b)(7) Which Satisfies Due Process of Law.

On remand, all the Georgia Supreme Court did was to examine the facts of Collins' case and distinguish them from the facts in Godfrey. The Georgia Supreme Court did not narrow the construction of § (b)(7). If petitioner were to receive a new trial on the penalty issue, the trial court would have no guidance as to the meaning of the terms of § (b)(7) to channel or narrow their expansive meaning. Is every murder which is preceded by a sexual crime "outrageously or wantonly vile, horrible or inhuman?" Is the same true of every murder where the victim did not threaten or cause emotional trauma to the alleged perpetrator? Does every murder where the alleged perpetrator left the scene of the crime or attempted to avoid prosecution involve "depravity of the mind?" There is an obvious and serious question as to whether the Georgia Supreme Court has done anything to alleviate the transparent arbitrariness caused by the vagueness and overbroadness of § (b)(7).

It is doubtful that the explanation for reaffirming the death penalty in petitioner's case even qualifies under

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[13] Counsel for the State in her peroration invoked what most assuredly must be the most arbitrary and vague standard for imposition of death which could be devised, considering how many manifestations of the Supreme Being have thus far occurred to mankind:

> For the crimes that he has committed Roger Collins' life must be forfeited; not only by the laws of man as put forth by us, but more importantly and more finally by the laws of God. (R.T. 366.)

Defense counsel did not object.

the Georgia Supreme Court's own decisions as meeting the requirements of § (b)(7). As this Court noted in Godfrey (48 L.W. at 4544), in Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) the Georgia Supreme Court said that the death penalty can only be approved where the criminal act in question lies "at the core" of depravity and vileness. There was no such measuring test done in petitioner's case.

Applying federal constitutional law, a California appellate court has found the following provision under California law unconstitutionally vague:

> [The death penalty may be imposed if] the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious, or cruel manifesting exceptional depravity means a consciousless, or pitiless crime which is unnecessarily torturous to the victim. California Penal Code § 190.2 (a)(14).

People v. Superior Court (Engert), 105 C.A.3d 365, 367.[14] The California court noted that in Gregg v. Georgia (1976) 428 U.S. 153 a similar provision of the Georgia law [§ (b)(7)] was under examination only insofar as it allowed arbitrariness in violation of the Eighth and Fourteenth Amendments and this Court did not consider the due process aspects of this language as this question was not within the limited grant of certiorari. The same problem of arbitrariness was all that was at stake in Furman v. Georgia, 408 U.S. 238. Examining the California provision in the light of due process requirements, the Court stated:

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[14] Vacated by this Court and remanded to determine whether based on state or federal constitutional grounds, ___ U.S. ___ (November 3, 1980).

> The jury must decide on life or death on the basis of a list of epithets which do not by their multiplication more precisely define conduct. [105 C.A.3d at 368]
>
> ***
>
> [S]ubdivision (a)(14) is an invitation to the jury to register a general feeling of revulsion toward a particular homicide defendant by finding the truth of that special circumstance. The section's vague language permits capricious and arbitrary application by a jury. [105 C.A.3d at 369]

C. The Georgia Supreme Court Deprived Petitioner of Due Process of Law By Failing to Allow Additional Written Or Oral Argument After This Court's Remand.

As established by the Declaration of Counsel attached to this Petition as Appendix E, after this Court reversed the decision of the Georgia Supreme Court on the death penalty issue and remanded for further consideration, counsel promptly requested the opportunity to present written and oral argument on the issue of the proper application of Godfrey v. Georgia to this case. This request was never answered. It is petitioner's position that the refusal of this request deprived him of procedural due process of law in that important issues regarding a life or death decision were decided without any input from petitioner or his counsel.

D. The Death Penalty Cannot Stand On The Alternative Ground of Aggravating Circumstance (2).

1. On remand, the Georgia Supreme Court reaffirmed the death penalty on the alternative ground that it could be upheld under § (b)(2), citing Gates v. State, 244 Ga. 587, 261 S.E.2d 349 and Burger v. State, 245 Ga. 458, 265 S.E.2d 296. In neither of these cases is there any discussion of

the possibility of constitutional error from an erroneous instruction on one of several aggravating circumstances in a death penalty case. It is merely assumed that the jury would have imposed the death penalty even if only one of the aggravating circumstances in the particular case was proven. However, under Georgia law, the trial court must make clear to the jury that it can recommend a sentence of life imprisonment even if it does find the existence of one or more statutory aggravating circumstances. Burger v. State (1978) 242 Ga. 28, 237 S.E.2d 834. It is thus logically and legally impossible to state that the jury would have come to the same conclusion with regard to petitioner's sentence if the § (b) (7) aggravating circumstance had not been present.

A similar problem was faced in the Supreme Court of North Carolina in State v. Cherry (1979) ___ N.C. ___, 257 S.E.2d 551. There the jury was instructed on several aggravating circumstances for imposing the death penalty, one of which was that the murder was committed while perpetrating another serious felony. However, this serious felony was also the reason why the defendant was eligible for the death penalty in the first place. The court held that this felony could not be considered an aggravating circumstance and that the jury finding that there were other aggravating circumstances did not allow the death penalty to stand. It stated (257 S.E.2d at 568):

> Had the jury not considered the underlying felony as an aggravating circumstance, it may well have decided that the remaining aggravating circumstances were not sufficiently substantial to call for imposition of the death penalty.

Obviously, each and every aggravating circumstance found to exist by the jury may tip the delicate balance to death rather

than life imprisonment, and any error in the weight put on the various scales requires a new determination with properly weighted scales.

As in Godfrey v. Georgia, supra, where the jury was given no guidance as to the meaning of § (b)(7)'s terms, the jury's actions if § (b)(7) had been properly explained and limited in this case "can only be the subject of sheer speculation." (48 L.W. 4544.) Certainly the error of failing to define § (b)(7) in petitioner's case cannot meet the standard for harmless constitutional error beyond a reasonable doubt as established in Chapman v. California (1967) 386 U.S. 18, 23-24. See also Stromberg v. California (1931) 283 U.S. 359, 367-368; Williams v. North Carolina (1942) 317 U.S. 287, 291-292; Terminiello v. Chicago (1949) 337 U.S. 1, 5; Bachellar v. Maryland (1970) 397 U.S. 564, 570-571.

2. There is also considerable doubt as to whether the jury's decision on both aggravating circumstances in this case was unanimous on both circumstances. The instructions to the jury were that they were to determine if "one or more" of the statutory aggravating circumstances exists beyond a reasonable doubt. (R.T. 378.) The verdict of the jury (R.T. 383) was that both aggravating circumstances existed, but when the jury was polled they were asked only whether that was their verdict, not whether each juror found that both aggravating circumstances existed beyond a reasonable doubt. Nor was the jury instructed that it had to be unanimous on each aggravating circumstance as contrasted with unanimous on whether the death penalty should be imposed because of the existence of "one or more" aggravating circumstances.

3. If § (b)(7) were to be eliminated from this case, the issue would be presented as to whether the sentence

of death under § (b)(2) was valid where the same felony, namely an alleged rape, was used as a basis for the imposition of the felony-murder rule in Georgia, thus eliminating the need to prove premeditation. In a similar circumstance, the Supreme Court of North Carolina has held that submitting the felony to the jury as a possible independent aggravating circumstance allowing the imposition of the death penalty would be unconstitutionally arbitrary. State v. Cherry (1979) ___ N.C. ___, 257 S.E.2d 551, 567-568.

The court in Cherry reached this result because a defendant convicted of a felony-murder will have one aggravating circumstance "pending" for no other reason than the nature of the conviction whereas a defendant convicted of premeditated murder enters the sentencing phase "with no strikes against him." (257 S.E.2d at 267.) The Court in Cherry concluded (257 S.E.2d at 568):

> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony-murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first degree murder under the felony-murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.

For these reasons the death penalty may not be affirmed on any ground independent of the validity of § (b)(7) under Georgia law.

III

IN THIS CASE DESPITE THE REMAND AFTER GODFREY v. GEORGIA GEORGIA LAW HAS OPERATED IN THE ARBITRARY AND UNEQUAL WAY CONDEMNED IN FURMAN v. GEORGIA

A. Durham's Sentence

The State's own evidence in this case shows that William Durham was the more culpable party in this rape murder. He was the one with the weapon, a knife (R.T. 113) the aggressor, the beater, the driver, the threatener,[15] and the person who forced the witness Styles to participate against his will. Unfortunately, due to the abject ineptitude of counsel for petitioner, these points were not brought home to the jury. Nevertheless, there is enough in this record to substantiate petitioner's position so that there is a substantial doubt as to the ability of his sentence to qualify under the Furman rules in the light of the life imprisonment sentence given to William Durham by another jury. See Durham v. State (1979) ___ Ga. ___, 254 S.E.2d 359.

This point was considered by the court below on the first appeal. Its response was to recapitulate the evidence showing that petitioner was "an active participant" in the crimes and not "a bystander or an unwilling or passive participant." (Appendix A.) It also declined to follow per se rules that multiple co-defendants must be given the same sentences and that no other participant in a murder may be given a greater sentence than the triggerman.

None of these responses is to the point. What is to the point is that the record shows at the least that there is no rational differentiation between the culpability of

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[15] STYLES: "She kept hollering, and Bill [Durham] told her if she don't hush some of that damn noise he going to take the knife and was going to rip her damn heart out." [R.T. 116.]

Durham and petitioner. But there is an irrational, unbridgeable gulf between their sentences. Durham will spend time in prison during which he will have a chance to rehabilitate himself, visit with friends and family, obtain an education, gain psychological insight into his character, and benefit directly and immediately from changes in the law or the evidence which would show that he was wrongfully or illegally convicted of the crimes. Petitioner's plight is as irreversible as the ashes in a fireplace.

If we are wrong in calling Durham the more culpable of the two, we do not believe we are wrong in saying that there is little if any difference between their culpability. Turning now to what this Court anticipated from the operation of the Georgia death penalty statutes in Gregg v. Georgia, supra, we see that Mr. Justice White joined by the Chief Justice and Mr. Rehnquist concurred in the judgment of affirmance because in Part III of his opinion he declined "to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner." The juxtaposition of the sentences of Durham and petitioner are not "simply an assertion" but a concrete example of irrationality. When we turn to the opinion of Mr. Justice Stewart, joined in by Mr. Justice Powell and Mr. Justice Stephens, we see that in Part IV(B)(2) strong emphasis is placed upon the review function of the Supreme Court of Georgia to determine whether a death sentence is proportional to other sentences imposed for similar crimes. Justice Stewart states that the proportionality requirement "is intended to prevent caprice in the decision to inflict the penalty. . . ." That system cannot be said to have performed

its function in this case and the problems uncovered by the Court in Furman are once again starkly presented. It is not petitioner's view that all co-defendants must be treated equally in sentencing. It is petitioner's view that the distinction between life and death in sentencing must be supported by articulated reasons pertaining to the individual defendant where the nature of the crime is the same for both. No such support is present in this record.

B. Sentence Review

In not reducing petitioner's penalty in view of the life imprisonment sentence given to William Durham the Supreme Court of Georgia ignored its own controlling precedent in Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978) and thus applied the death penalty capriciously, arbitrarily and unequally to petitioner. The Hall case involved an armed robbery in which the defendants were separately tried. Defendant James Smith received a life sentence. Defendant Jimmy Hall was sentenced to death. In view of the disparity, the Georgia Supreme Court set aside the death sentence, three justices dissenting. The majority stated:

> Likewise, because of the similarity of the crime, we must give special consideration to the sentence received by the co-defendants in the same crime. [244 S.E.2d at 838.]

No special consideration was given petitioner. It is extremely difficult to reconcile Hall v. State with Collins v. Georgia. It is true that under one view of the evidence petitioner might be considered the "triggerman" in this murder as having struck the first blow, but such per se distinctions were specifically disavowed in favor of more individualized consideration in Hall v. State. As the dissent points out in Hall, there were numerous reasons why a jury might have considered defendant Hall

more culpable than defendant Smith. Hall had a long and continuous criminal record dating from 1956. He had completed high school and was 40 years old at the time of his crime. Smith was 34 years old, had a much lighter past record and had a wife and family. Petitioner's death sentence is arbitrary, capricious and manifestly irrational in the face of life sentences for Hall and Durham.

C. Commission of Rape

A second aggravating circumstance charged to the jury was that the offense of murder was committed while the petitioner was engaged in the "commission of rape." Ga. Code Ann. § 27-2534(b)(2). All the evidence in this case indicates that the rape was completed well before the murder. After the rape, William Durham led the victim off to another place well beyond the vision of witness Styles and he was followed by petitioner and then the murder ensued. There is a clear failure to meet the statutory language that the murder must be committed "while the offender was engaged in the commission of another capital felony. . . ."

D. Capital Felony

As noted immediately above, to satisfy § 27-2534(b)(2), the murder must be committed "while the offender was engaged in the commission of another capital felony. . . ." At the time of this murder rape was no longer a capital felony under Georgia law. The trial judge, noting this change, simply left off the word "capital." See R.T. 377. This amendment of the Georgia capital punishment statute by the trial judge adds a further level of uncertainty to the Georgia death laws. Has not the Georgia legislature decided that only another "capital"

crime would qualify as an aggravating citcumstance? Does Georgia law allow the trial judge to modify this to mean any felony committed in connection with a murder is a sufficient aggravating circumstance? If indeed the Georgia law does allow this amendment by the trial judge, does such an uninhibited discretion comport with this Court's requirements in Furman v. Georgia and its expectations is Gregg v. Georgia?

E. The Murder Was Not Extreme

There is much discussion in Gregg v. Georgia that the death penalty is meant to be reserved for extreme or aggravated cases. This Court noted in Godfrey that the Georgia Supreme Court has said in Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1, 11 (1976) that it will restrict its "approval of the death penalty under the statutory aggravating circumstance to those cases that lie at the core." The very constitutional necessity to set forth standards for aggravation in order to avoid the arbitrariness discovered in Furman v. Georgia indicates that routine murder[16] may not be punished by the most extreme sentence of death without violating the Eighth Amendment. There are no special facts which distinguish this murder from the bulk of other murders in the United States. Yet it is well recognized that the vask bulk of murders do not result in the death sentence. As suggested by Mr. Justice Stewart in his opinion in Gregg v. Georgia:

> Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.

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[16] We apologize for suggesting that there is such a thing as a "routine" murder, as every human life is unique. Nevertheless, some murders are more aggravated, more extreme, more chilling, more jarring and more worthy of punishment than others.

It is petitioner's position that the Constitution requires courts reviewing death sentences to articulate rational grounds as to why the crime in question is more aggravated than other murder cases which have been considered by the reviewing court. There is no such articulation in this case nor could there be. As Mr. Chief Justice Burder iterated in his opinion in Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 987:

> Furman did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," id. at 189, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the cases in which it is not." Id. at 188.

F. Inadequacy Of Counsel On Petitioner's Background

The Georgia Supreme Court, by affirming and reaffirming the conviction and sentence in this case, has given its stamp of approval to the adequacy of representation of petitioner at his trial. If, however, this representation was such that petitioner received the death sentence without his character and background being considered by the jury then the requirements of Woodson v. North Carolina (1976) 428 U.S. 280, 304 have not been met. That case requires such consideration as an indispensible part of the process of inflicting the death penalty. This requirement was again emphasized in the opinion of Mr. Chief Justice Burger for four members of the court in Lockett v. Ohio, supra, 57 L.Ed.2d at 988-989.

We find no comment on such inadequacy of the record either in the trial court or in the Georgia Supreme Court.

This is because petitioner's trial counsel was appointed to represent him on appeal and the Georgia Supreme Court did not reach out to discuss any issues not briefed by counsel. Counsel did not brief his own inadequacy.

Without necessarily raising the issue of the adequacy of counsel in the Sixth Amendment sense, where counsel does not provide an adequate background of a defendant in a capital case to a jury considering mitigating factors and sentencing, that counsel has undermined one of the most important defenses against arbitrariness which this Court has mandated be present in all death penalty cases.

Defense counsel's strategy in this case was most puzzling. Defendant did not testify until the penalty phase of his trial and then he testified that he did not kill the victim and he was in fear of the man who did. This was directly after the jury had found that he was guilty beyond a reasonable doubt of premeditated murder with malicious intent. Even at that stage, petitioner was not asked by his counsel about the charge of rape. Incredibly enough, it was not until the judge was about to sentence petitioner to death that he was allowed to speak and denied that there had been a rape. (R.T. 394.) Trial counsel never took the opportunity to explain on the record out of the presence of the jury why his client denied both the rape and the murder but did so at completely inappropriate procedural stages of the process.

Despite the fact that his client had no criminal record whatsoever the jury never learned this fact as the defense counsel never brought it before them. Very little concerning the background and nothing concerning the motives of petitioner were brought before the jury. Not one member

of petitioner's family nor one of his friends was brought forward to testify as to any redeeming social qualities. Petitioner's mental background was not explored. His ability to be dominated or led by other people was not explored.

If, as this Court has stated, to avoid irrationality in the application of the death penalty an individualized process is required, then this petitioner did not receive such a process. This petitioner's background was not before the jury. What was before the jury was an inflammatory argument by the prosecutor insisting on the "eye for an eye" rule from the Old Testament (R.T. 358) as if the mitigating factors provided for in the Georgia law did not exist. The prosecutor argued:

> The defendant is an animal. No, I take that back; he is not an animal. Roger Collins is not an animal. Animals are better than Roger Collins. . . . [R.T. 361.]

Without objection, the prosecutor was allowed to tell the jury that Roger Collins "has killed so many peoples he can't even remember how many he's killed." (R.T. 364.) There was no evidence of other killings except that the prosecution witness Styles stated that Collins had told him that he killed other people. In the light of this inflammatory argument the failure of defense counsel to present available mitigating factors must be at least held to have deprived petitioner of his right to effective representation in the trial for his life.

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IV

CONCLUSION

For the reasons stated this Court should review the conviction and death penalty sentence of Roger Collins by issuing its writ of certiorari to the Supreme Court of Georgia.

Dated: November 5, 1980

Respectfully submitted,

KRAUSE, TIMAN, BASKIN, SHELL & GRANT

By _____
MARSHALL W. KRAUSE
Attorney for Petitioner

June 3, 1980

80-5672

Honorable Chief Justice and
Associates Justices of the
Supreme Court of the State of Georgia
506 Judicial Building
Capitol Square
Atlanta, GA 30334

RE: Collins v. The State
No. 33879

Dear Justices:

We have received word from the Clerk of the Supreme Court of the United States that the above case was remanded for further consideration in the light of Godfrey v. Georgia. This firm is acting as volunteer counsel for Mr. Collins and we filed the Petition for Writ of Certiorari in his case.

We believe that Godfrey v. Georgia presents a number of new issues for the Supreme Court of Georgia to consider including, for instance, the effect of that decision where, as in our case, the death sentence was imposed on more than one ground. We respectfully suggest that the parties be given an opportunity to file supplemental briefs in the above case and that the case be set down for a new oral argument.

We also wish to call to the attention of the court that in the course of preparing the Petition for Writ of Certriorari counsel have come across several new arguments which were not presented to the Supreme Court of Georgia but which present substantial claims under the Georgia and United States Constitutions. These include the effect of the opinion of the United States Supreme Court in Sandstrom v. Montana, ___ U.S. ___, 47 U.S. Law Week 4719 (June 18, 1979) which we believe raises substantial questions as to the validity of the jury instructions on the issue of guilt in this case.

We are enclosing a copy of our Petition for Writ of Certiorari filed with the Supreme Court of the United States and respectfully request that this copy be lodged with the court in the event it needs to be consulted. Unfortunately, we do not have a file-stamped or endorsed

Exhibit #1

copy of this Petition for Writ of Certiorari but I believe that its accuracy as a true copy will not be contested by the Attorney General of the State of Georgia, to whom a copy of this letter is being sent.

Respectfully yours,

KRAUSE, TIMAN, BASKIN, SHELL & GRANT

By_____
MARSHALL W. KRAUSE
Attorney for Roger Collins

MWK/sm
cc: Attorney General of the State of Georgia

APPENDIX E

MARSHALL W. KRAUSE, ESQ.
KRAUSE, TIMAN, BASKIN, SHELL & GRANT
Wood Island, Suite 207
60 E. Sir Francis Drake Blvd.
Larkspur, CA 94939
Telephone: (415) 461-4100

Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

---oOo---

ROGER COLLINS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

No. 80-5672

AFFIDAVIT OF COUNSEL

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

MARSHALL W. KRAUSE states that he is the attorney for the petitioner and has been such since approximately April of 1979.

After this Court's decision reversing and remanding this case for re-examination in the light of Godfrey v. Georgia, 446 U.S. ___ (1980) he wrote to the Supreme Court of Georgia and requested the opportunity to file a supplemental brief and to argue the matter orally. A true copy of this letter is attached to this affidavit as Exhibit #1 and herein incorporated by this reference. No response to this letter was ever received and petitioner or his counsel did not have the opportunity to file any written statement with the Supreme Court of Georgia or present any oral argument to the Supreme Court of Georgia prior

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to its new decision dated September 8, 1980.

Dated: November 5, 1980

KRAUSE, TIMAN, BASKIN, SHELL & GRANT

By _____
MARSHALL W. KRAUSE

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

On this the 5th day of November, 1980, before me, SALLY MOSES, the undersigned Notary Public, personally appeared MARSHALL W. KRAUSE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

SALLY MOSES, Notary Public
EUREKA
My Comm. Exp. June 30 1981
County of Marin, Calif.

_____

YOU ARE TO NOTIFY THE DEFENDANT OF THIS DECISION WITHIN 5 DAYS.

In the Supreme Court of Georgia.

Decided: MAR 06 1979

33879. COLLINS v. THE STATE

NICHOLS, Chief Justice.

Roger Collins was tried by a jury in Houston County for the rape and murder of Deloris Luster. He was convicted of both offenses and was sentenced to death for the murder and fifteen years imprisonment for the rape. He is before this court on direct appeal and for mandatory review of the death sentence imposed upon him.

There was evidence admitted that would authorize the jury to find the following:

During the night of August 6, 1977, Roger Collins, William Durham and Johnny Styles were drinking and carousing. While the three companions were sitting around drinking and talking, Durham jumped up and said three times that he loved to kill.

Later the same night, they saw Deloris Luster getting out of an automobile. Collins called her over to the car in which they were riding and asked her to engage in sexual intercourse. She declined but accepted an invitation to drive her home. Instead of taking her home, Durham drove them around for awhile, engaging in various acts of wreckless driving which finally resulted in the automobile's muffler being knocked off.

Durham stopped the automobile to check the damage, and he and Collins conversed for a few moments out of Styles' hearing. Upon their return, Styles asked Durham what he and Collins had been talking about. Durham replied that they were going to have sexual relations with Deloris Luster.

After they got back in the car with Durham driving, they drove to a pecan orchard and stopped at the gate. Deloris Luster asked why they had stopped, but they did not answer. Durham opened the gate, drove in, and closed the gate. She told Durham that she was two months pregnant and had a venereal disease. Collins told her that if he caught the disease, he was going to do something to her. After Durham turned the car around, he got out and grabbed her, snatching her out of the car. Durham started to remove her clothes, but she proceeded to remove them while Collins removed the back seats from the car. While Durham, who was brandishing a knife, and Styles waited nearby, Collins had sexual intercourse with her. She was screaming and saying, "Why me!"

When Collins finished with her, Durham ordered Styles to have intercourse with her. Styles pretended intercourse for about two minutes. Durham told her that if she didn't stop screaming, he was going to use the knife to 'rip her damn heart out." Durham struck the knife beside her head, slapped her in the face and proceeded to have intercourse with her. Durham then forced Styles to have intercourse with her again. Styles heard Durham ask Collins, 'Is there anything else that you want to do to her because won't nobody else, won't nobody else see her no more, won't nobody else get no more of this . . . ."

Durham took her hand and led her up the dirt road into the pecan orchard with Collins following. She said, "Y'all going to kill me, ain't you?" Collins stopped, went back to the car, opened the trunk and removed the jack. Armed with the jack, Collins followed Durham and Deloris Luster. Moments later, Styles heard "about three licks." Collins returned to the car, followed by Durham, "joking each other." Durham was carrying the jack which was bloody all over. Collins had blood on his feet and instructed the others that

if anyone asked how the blood got on them, they should say that he had cut his feet earlier that day. Styles gathered Deloris Luster's clothes and the three left. Styles heard Collins say to Durham, "Hey, man, you didn't think I was going to hit her up 'side the head too." As they were leaving, Collins told Styles that he had killed so many people he could not remember how many.

The jack was thrown alongside the road in two pieces. When recovered, it was covered with blood and hair. A latent fingerprint left on the jack was positively identified as the right thumbprint of Collins.

At daybreak, Styles reported these matters to the police. The body was located, and later in the day, Collins and Durham were arrested and given Miranda warnings.

That afternoon Collins again was advised of his rights but did not make a statement. Later that evening, after once more being advised of his rights, he made a statement in which he admitted that he had picked up the victim under the pretext of carrying her home, and that he had instead carried her to a pecan orchard, accompanied by Durham and Styles, where he and the others had raped her. He admitted also that afterward he hit her in the head with a jack and then gave the jack to Durham.

Death resulted from massive head injuries caused by multiple blows of great force. Sperm was found in the victim's vagina and rectum.

1. In his first enumeration of error, Collins contends that Ga. Code Ann. § 59-806(4), allowing prospective jurors to be asked on voir dire whether they are conscientiously opposed to capital punishment, denies him an impartial jury in violation of the Sixth and Fourteenth Amendments.

This issue has been raised numerous times before this court, and in each instance this court has ruled that the asking of the question does not violate constitutional

guarantees under the state and federal constitutions. Abrams v. State, 223 Ga. 216 (13) (154 SE2d 443) (1967); Clarke v. Grimes, 223 Ga. 461 (4) (156 SE2d 91) (1967); Jones v. State, 224 Ga. 283 (2) (161 SE2d 302) (1968); Smith v. Hopper, 240 Ga. 93, 94 (239 SE2d 510) (1977).

The first enumeration of error is without merit.

2. In the second enumeration of error, Collins attacks the constitutionality of the death penalty act. Ga. L. 1973, p. 159; Ga. Code Ann. § 27-2534.1.

The constitutionality of the Georgia death penalty statute has been upheld by the Supreme Court of the United States and by this court each time it has been attacked on constitutional grounds. Gregg v. Georgia, 428 U. S. 153 (96 S. Ct. 2909, 49 LE2d 859) (1976); Coley v. State, 231 Ga. 829 (204 SE2d 612) (1974); House v. State, 232 Ga. 140 (205 SE2d 217) (1974); Eberheart v. State, 232 Ga. 247 (206 SE2d 12) (1974); Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974); McCorquodale v. State, 233 Ga. 369 (211 SE2d 577) (1974); Prevatte v. State, 233 Ga. 929 (214 SE2d 365) (1975); Young v. State, 237 Ga. 852, 856 (230 SE2d 287) (1976).

This court has considered the contention that the aggravating circumstance set forth in Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague, and has found it to be without merit. Harris v. State, 237 Ga. 718, 732-34 (230 SE2d 1) (1976). See also Blake v. State, 239 Ga. 292 (236 SE2d 637) (1977).

The second enumeration of error is without merit.

3. In the third enumeration of error, the appellant alleges that "The trial court erred in excusing for cause juror Jannette C. Curr upon motion of the State."

In response to questioning during the voir dire examination, Mrs. Curr made it unmistakably clear that she was unequivocally opposed to the imposition of the death penalty under any and all circumstances and that she would not vote to impose it regardless of the evidence and the charge of the court.

This complies with Witherspoon v. Illinois, 391 U. S. 511 (1968); Davis v. Georgia, 429 U. S. 122, 123 (1976); and Goodwin v. Hopper, Case No. 34234, decided February 6, 1979.

The third enumeration of error is without merit.

4. In the fourth enumeration of error, Collins alleges that the trial court erred in overruling his motion for an order directing the district attorney and the State's witnesses to refrain from making any direct or indirect reference to other pending charges against him or other crimes unrelated to the charges in this case.

The testimony complained of is that of Johnny Styles who recounted comments the appellant had made to him the night of the rape and murder concerning the number of people Collins claimed to have killed and an assault that Collins claimed to have committed.

Ga. Code Ann. § 38-305 provides: "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the res gestae."

The statements were made before the murder weapon or the victim's clothing had been discarded and while Collins was bragging about having participated in the killing of the victim. As such, they were clearly part of the res gestae and were admissible. Ga. Code Ann. § 38-305. Additionally, having made no objection at the time of the testimony, appellant cannot assert error for the first time in his appeal. White v. State, 231 Ga. 290 (201 SE2d 436) (1973). "A party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later." Joyner v. State, 208 Ga. 435, 438 (67 SE2d 221) (1951).

The fourth enumeration of error is without merit.

5. In the fifth enumeration of error, Collins contends that the trial court erred in allowing Styles to testify during Collins' trial concerning statements made to Styles by Durham.

The statements here complained of were made after the victim had been snatched out of the car, and before she was murdered by Collins and Durham. While speaking, Durham was brandishing the knife used to intimidate Styles and the victim, who was being raped by Collins a few yards away. These statements by Durham about other crimes clearly were used as a part of the intimidation process and, as such, were a part of the res gestae. Ga. Code Ann. § 38-305. No confrontation question is presented in that none of the other offenses are attributed to Collins. Neither is any issue of the confession of a co-defendant presented inasmuch as the statement does not concern crimes for which Collins is charged.

The fifth enumeration of error is without merit.

6. In his sixth enumeration of error, Collins contends that the trial court erred by refusing to grant his motion for a commitment hearing.

Collins was arrested on August 7, 1977. Three days later, on August 10, 1977, he was indicted by the Houston County grand jury with co-defendant William Durham for the offenses of rape and murder. He moved for a commitment hearing on October 20, 1977, and after a hearing on the matter, the trial court overruled the motion.

"[A] preliminary hearing is not a required step in a felony prosecution and . . . once an indictment is obtained there is no judicial oversight or review of the decision to prosecute because of any failure to hold a commitment hearing. Finally, in no event will we overturn a conviction on direct appeal or on collateral attack because a commitment hearing was denied appellant." State v. Middlebrooks, 236 Ga. 52, 55 (222 SE2d 343) (1976).

The sixth enumeration of error is without merit.

7. In the seventh enumeration of error, Collins contends that "The trial court erred by refusing to grant Appellant's

motion for a directed verdict of acquittal on the rape charge. The conviction of rape is not supported by the evidence."

The jury's verdict must be honored if there is any evidence to support it. Cunningham v. State, 235 Ga. 126, 127 (218 SE2d 854) (1957). Unless a verdict of acquittal is demanded as a matter of law, the refusal to direct the verdict is not error. Merino v. State, 230 Ga. 604 (198 SE2d 311) (1973). The victim was acting under intimidation. Any assent on her part was induced by fear as a result of being taken to a remote location in the woods against her will, being jerked from the car, and being menaced by the co-defendant who stood nearby armed and telling of his violent offenses. The victim tried to avoid the attack by telling her assailants that she had venereal disease and that she was pregnant. The record is devoid of any consent to intercourse with her assailants. In his pretrial statement, appellant stated that the victim had been raped and murdered. A lack of physical resistance may spring from reasonable apprehension of great bodily harm, violence, or other dangerous consequences to herself. Intimidation may substitute for force. Curtis v. State, 236 Ga. 362 (223 SE2d 721) (1976). Contrary to Collins' assertions, a charge of rape may be proven although the victim is unable to testify because she subsequently was murdered by her assailant. Spraggins v. State, 240 Ga. 759, 761 (243 SE2d 20) (1978).

There was evidence from which the jury could find each element of the offense of rape. Ga. Code Ann. § 26-2001. The seventh enumeration of error is without merit.

8. In the eighth enumeration of error, Collins contends that "The trial court erred in allowing the jury to consider the statutory aggravating circumstance that the offense of murder was committed while the offender was engaged in the commission of another capital felony, namely the offense of rape." This enumeration of error is without merit for the reasons stated in Division Seven of the present opinion.

9. In Thomas v. State, 240 Ga. 393, 401 (240 SE2d 824) (1977), this court held that mitigating circumstances "are not required to be singled out under Georgia law." The ninth enumeration of error is without merit.

10. In the tenth enumeration of error, Collins contends that "The trial court erred in furnishing the jury with forms during the jury's sentence deliberations which contained the exact wording of the two statutory aggravating circumstances alleged to have been demonstrated by the evidence."

Ga. Code Ann. § 27-2534.1(c) provides in part: "The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation." The trial judge merely complied with this statute, and there is no constitutional, legislative, or judicial prohibition against such practice. McCorquodale v. State, 233 Ga. 369, 377 (12) (211 SE2d 577) (1974).

The tenth enumeration of error is without merit.

11. The charge of the trial court accords with the guidelines laid down in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977); Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977); and Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978). The eleventh enumeration of error is without merit.

12. In the twelfth enumeration of error, Collins contends that "The trial court erred in charging the jury that it should state whether the sentence it imposed in the murder case would run concurrently or consecutively with the sentence to be imposed by the Court in the rape case."

Georgia law provides that the judge shall impose sentence in those cases where a sentence other than death is to be imposed. Ga. Code Ann. §§ 27-2502, 27-2503. After objection by Collins' counsel, the trial court stated that the jury only would be making a recommendation for the court's consideration. Collins has failed to specify how this procedure, if erroneous, was harmful to him. Accordingly, the twelfth enumeration of error is without merit.

13. The thirteenth enumeration of error complains that the prosecutor in his closing argument argued matters not in evidence. Upon objection of defense counsel, the court cautioned the jury that the prosecutor's remarks were not evidence. There was no objection to the prosecutor's remark that Collins killed the victim "like an animal." No motion was made for a mistrial. Pretermitting waiver, the prosecutor's argument did not fall within the proscriptions of Prevatte v. State and Jordan v. State, 233 Ga. 929, 931 (214 SE2d 365) (1975), and the trial court did not abuse its discretion on this matter. Wisdom v. State, 234 Ga. 650, 655 (217 SE2d 244) (1975).

The thirteenth enumeration of error is without merit.

14. The fourteenth and fifteenth enumerations of error are considered together with the sentence review.

SENTENCE REVIEW

In our sentence review, we have considered the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant introduced in court. We have reviewed the sentence as required by Ga. L. 1973, p. 159 (Code Ann. § 27-2537(c)(1-3)), as we have in each case that we have reviewed involving a death penalty under this statute. We conclude that the sentence of death imposed on Roger Collins was not imposed under the improper influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537(c)(1).

The jury found as statutory aggravating circumstances:

(1) the offense of murder was committed while the defendant was engaged in the commission of rape (Code Ann. § 27-2534.1(b)(2)), and

(2) the offense of murder was outrageously or wantonly vile, horrible or inhumane in that it involved torture or depravity of mind (Code Ann. § 27-2534.1(b)(7)).

The evidence supports the statutory aggravating circumstances found.

27-2537(i).

Collins argues that his death penalty should not be upheld inasmuch as Durham, his co-defendant, was given only a life sentence. We never have followed any simplistic rule that where one of multiple co-defendants is given a life sentence, none of the other co-defendants may be sentenced to death. Neither have we created a per se rule that where the triggerman does not receive the death sentence, it may not be imposed on other participants in the crime. Hall v. State, 241 Ga. 252 (244 SE2d 833) (1978).

The evidence does not establish Durham as the prime mover or sole perpetrator of this murder. Collins' car was used. He was the one who propositioned the victim and offered to take her home. After the victim stated she had a venereal disease to avoid the rape, he told her if he caught the disease from her, he would harm her. He removed the seats from the car that were used in the rape of the victim and raped the victim first. He took the jack from the trunk of the car and followed Durham and the victim into the orchard. He had blood on his feet and admitted that he had hit the victim first and then had given the jack to Durham to complete the killing. His fingerprint was on the jack.

Under these circumstances we cannot say that Collins was a bystander or an unwilling or passive participant. On the contrary, the evidence clearly establishes that he was an active participant in all aspects of the rape and murder of the victim. Hill v. State, 237 Ga. 794 (229 SE2d 737) (1976).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder. We find that those similar cases set forth in the appendix support the affirmance of the death penalty. Roger Collins' sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537(c)(3).

Judgment and sentence affirmed. All the Justices concur.

APPENDIX

Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974)

Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974)

Moore v. State, 233 Ga. 861 (213 SE2d 829) (1974)

Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975)

Berryhill v. State, 235 Ga. 549 (221 SE2d 165) (1975)

Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976)

Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976)

Pullian v. State, 236 Ga. 460 (224 SE2d 8) (1976)

Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976)

Young v. State, 237 Ga. 852 (230 SE2d 287) (1976)

Douthit v. State, 239 Ga. 81 (235 SE2d 493) (1977)

Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977)

Stanley v. State, 240 Ga. 341 (241 SE2d 173) (1977)

Campbell v. State, 240 Ga. 352 (240 SE2d 828) (1977)

Thomas v. State, 240 Ga. 393 (242 SE2d 1) (1977)

Alderman v. State, 241 Ga. 496 (246 SE2d 642) (1978)

Drake v. State, Case No. 33463, decided June 27, 1978

Collins

APPENDIX B

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 3/27/79

The motion for a rehearing was denied today:

Case No. 33879. Collins v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

In the Supreme Court of Georgia

Decided: SEP 8 1980

33879. COLLINS v. STATE.

NICHOLS, Justice.

By its order of May 27, 1980, the Supreme Court of the United States vacated this court's judgment in this case as to the death sentence (243 Ga. 291 (253 SE2d 729)(1979)) and remanded for further consideration in light of Godfrey v. Georgia, 446 U.S. _____(1980).

As mandated, this court has reexamined the holding in this case that the evidence supports a reasonable trier of facts in finding beyond a reasonable doubt that the appellant's murder of the victim was "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." Code Ann. § 27-2534.1(b)(7).

In Godfrey, the court found that Code Ann. § 27-2534.1(b)(7) had been unconstitutionally applied. This court finds material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate. The evidence in this case clearly establishes that the victim was not related to the appellant. She was not threatening the appellant nor was she causing any emotional trauma to him. The appellant left the scene and attempted in every manner to avoid prosecution for his crime.

As set out in the original opinion, the autopsy report showed that while the victim had died relatively instananeously from a massive head injury, she also had been raped and

sodomized. The evidence shows she had been sexually abused by appellant and his two codefendants prior to death. See Burger v. State, 245 Ga. 458 (265 SE2d 296)(1980); Stevens v. State, 245 Ga. 583 (266 SE2d 194)(1980).

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra. Serious sexual abuse may be found to constitute serious physical abuse, House v. State, 233 Ga. 140 (205 SE2d 217)(1974). Hance v. State, Case No. 38012, decided June 24, 1980. A defendant who tortures the victim before killing the victim can be found to have a depraved mind. Hance v. State, supra.

Accordingly, this court holds that the present jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey that, beyond a reasonable doubt, the murder of the victim was of a type universally condemned by civilized society as "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." See Mulligan v. State, Case No. 35314, decided June 24, 1980.

As was noted in Dampier v. State, Case No. 35378, decided June 24, 1980, this case is also of the type wherein the sentence of death rests only partially upon Ga. Code Ann. § 27-2534.1(b)(7). The jury returned a finding of two statutory aggravating circumstances. Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, supra, the Supreme Court of the United States was concerned exclusively with a sentence of death resting only upon Code § 27-2534.1(b)(7). Godfrey v. Georgia, 446 U.S. _____(1980).

Therefore, under our decisions, the death penalty may also be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349)(1979); Burger v. State, supra.

Judgment of affirmance of the death penalty adhered to. All the Justices concur.

APPENDIX D

27-2534.1 Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation.

The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

27-2537 Review of death sentences.

(a) Whether the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other aribtrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony

cases in which the sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

NO. 80-5672

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Supreme Court, U.S.
FILED
DEC 9 1980
MICHAEL RODAK, JR., CLERK

ROGER COLLINS,

Petitioner,

ORIGINAL COPY

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTIONS PRESENTED

1.

Was the jury instruction pursuant to Ga. Code Ann. § 26-604 and § 26-605 constitutional?

2.

Was the death penalty properly imposed in light of Godfrey v. Georgia, 446 U.S. ___ (1980)?

3.

Is Georgia's death penalty law, previously upheld in Gregg v. Georgia, 428 U.S. 153 (1976), constitutional?

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NO. 80-5672

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROGER COLLINS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Roger Collins was convicted in the Superior Court of Houston County, Georgia, for raping and bludgeoning to death Delores Luster. He was sentenced to die for the murder; fifteen years imprisonment was imposed for the rape. (R. 54-55, 60). A codefendant, William Durham, was separately tried and convicted; he was given consecutive sentences of life and fifteen years.

Collins' conviction and sentence were affirmed by the Supreme Court of Georgia in Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979). The evidence adduced at Collins' trial, recounted in the appellate decision, was that Collins (1) coerced his victim into the automobile under a pretext of carrying her home, (2) threatened her if he contracted a venereal disease, (3) upon reaching the pecan orchard where the crimes were committed removed the rear seat from the automobile, (4) was the first to rape her, (5) removed from the automobile's trunk a jack and, with the weapon, followed as his codefendant led the victim down a dirt road away from where she had been raped, (6) returned to the car following the murder with blood-spattered feet, (7) instructed his cohorts to lie about the blood should anyone ask, (8) left his thumbprint on the murder weapon, and (9) ultimately admitted raping the victim and hitting her over the head with the jack. Collins v. State, supra at 291-93.

Collins petitioned this Court for a writ of certiorari which, on May 27, 1980, was granted and the case was remanded to the Supreme Court of Georgia for reconsideration in light of Godfrey v. Georgia, 446 U.S. ___ (1980). Collins v. Georgia, Case No. 79-5188. On remand, upon reconsideration, that court unanimously affirmed. From that decision Petitioner seeks this review.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE JURY INSTRUCTION UNDER GA. CODE ANN. § 26-604 AND § 26-605 WAS CONSTITUTIONAL.

In his first enumeration, Petitioner attempts to equate a portion of the jury instruction given by the trial court to that which this Court found impermissible in Sandstrom v. Montana, 442 U.S. 510 (1979). A review of the charge as given by the trial court plainly shows it does not come within the purview of Sandstrom.

At the outset of the instruction to the jury during the guilt phase of trial, the trial court charged:

> Every person is presumed innocent until proven guilty. No person shall be convicted of a crime unless each essential element of such crime is proved beyond a reasonable doubt. The burden of proof is upon the State to establish each essential element of the crime beyond a reasonable doubt. A defendant cannot be convicted on mere speculation or conjecture. . . .

(T. 321). Therefore, the jury was first instructed on the presumption of innocence and the state's burden of proving every element of the crimes charged. Thereafter, the jury was instructed "[a]t no time is it the duty of a defendant to prove his innocence." (T. 322).

Having so instructed the jury, the trial court then charged in the language now complained of, to wit:

A presumption is a conclusion which the law draws from given facts. Each of the following presumptions that I am going to give you is rebuttable; that is, each is subject to being overcome by evidence to the contrary. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the trier of facts may find such intention upon consideration of the acts, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is tried.

Criminal intent is a necessary ingredient of crime and proof of that intent must exist before a conviction is authorized. Whether it has been shown is ordinarily for the jury to decide. It may be demonstrated by the acts and conduct of the defendant, it may be inferred from the proved circumstances or it may be presumed where it appears to be the necessary or probable consequence of the defendant's acts.

(T. 327-28). (Emphasis supplied). It is evident that the trial court instructed the jury that the defendant was presumed innocent, that the state had the burden of proving beyond a reasonable doubt

every element of the offense, and that the jury could infer criminal intent from the evidence but that criminal intent could not be presumed. Id.

In Sandstrom v. Montana, 442 U.S. 510 (1979), this Court held impermissible an instruction to the jury couched in mandatory terms which conceivably required a finding of the element of intent, a necessary element in the offense of "deliberate homicide," upon finding that the defendant had committed the act. The trial court charged, in effect, that intent could be presumed; the language of the charge as given was such that the instruction appeared to mandate a finding of intent, thus relieving the prosecution of its burden of proof.

The charge here complained of offends neither element with which this Court was concerned in Sandstrom. Not only does the charge not mandate a finding of malice, it is plainly an instruction that criminal intent cannot be presumed but may be inferred from the evidence. Second, it is not an irrebuttable direction requiring a defendant to proffer a quantum of proof; the evidence presented standing alone allows the jury to determine whether or not criminal intent is present.

In his brief, Petitioner states that "[t]he jury might have neglected the defense of duress [1] because intention was presumed and there was no testimony to the contrary. The jury was told that this presumption was a conclusion which the law draws unless it is rebutted. Since the Defendant did not testify or

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[1] Duress, or coercion, is no defense to murder even if there were evidence presented. Ga. Code Ann. § 26-906.

offer any evidence, the jury obviously could not find that the presumption had been rebutted." (Petitioner's Brief, p. 14). In Petitioner's effort to bring the charge actually given in his trial under the prohibition of Sandstrom, he misreads the plain language of the charge given in his case. The jury was instructed in unambiguous terms that criminal intent may not be presumed.

Petitioner argues that "[t]here was no evidence whatsoever in this case that Petitioner intended to kill the victim. There was no witness to the killing who testified. Thus the jury was forced to rely upon circumstantial proof for this vital element of the prosecution case." (Petitioner's Brief, p. 14). Of course the jury of necessity relied upon circumstantial proof for the element of intent; how else can intent be demonstrated except by the surrounding circumstances of the act committed? The only alternative means of establishing intent is for the defendant to testify to such intent. The logical extension of Petitioner's argument precludes conviction for any offense in which intent is an element unless the defendant freely admits the requisite intent. This Court in Sandstrom did not forbid the use of inferences in criminal trials.

The jury, as Petitioner contends, might well have presumed from the evidence of Petitioner's actions (which, by the way, involve far more than picking up a jack handle and walking in the direction of the victim and the codefendant) that Petitioner intended to inflict injury on the victim. A jury presumes much in the course of any criminal trial, and more when circumstantial evidence is presented.[2/] But the jury in Petitioner's case was

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[2/] This was not solely a circumstantial evidence case; Petitioner admitted raping and striking the victim.

not instructed that intent to murder must be presumed if certain preliminary facts are found. It was instructed that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will." (T. 327). The jury was also instructed that the presumption was rebuttable. But the jury was not instructed that intent may be presumed. The trial court plainly charged that "[a] person will not be presumed to act with criminal intent. . . ." (T. 327).

From the evidence the jury may well have inferred that Petitioner intended to inflict or assist in inflicting the injuries upon the victim. Indeed from the evidence it did so infer. But inferring or presuming from the evidence that Petitioner, because he inflicted the blows, intended the injury, which was a permissible inference from the evidence presented, is a far cry from presuming he committed murder. The offense of murder is not complete until malice is established, and malice, or criminal intent, is a forbidden presumption under Georgia law which must be established by the evidence. The charge as given is improper only if the sole means of conviction in such circumstances is direct evidence on all elements from the mouth of the defendant. This is not what this Court held in Sandstrom.

II. THE DEATH PENALTY WAS PROPERLY IMPOSED IN LIGHT OF GODFREY v. GEORGIA, 446 U.S.___(1980).

Petitioner's second contention is that the Supreme Court of Georgia incorrectly applied Godfrey v. Georgia, 446 U.S.___(1980) on remand. Petitioner makes a two-pronged challenge: (1) the jury's discretion was not sufficiently narrow and (2) the presence of a second aggravating circumstance cannot suffice to uphold the death penalty.

Petitioner argues that review by the Supreme Court of Georgia on remand does not cure what he claims was an insufficiently guided jury. The implication is review by the Supreme Court of Georgia is, in effect, a de novo sentencing and the appropriate course of action would be to order new jury sentencing. If that is Petitioner's assertion, it is without support. Upon initially reviewing Petitioner's death sentence, the Supreme Court of Georgia considered the death penalty as it is required to do under Georgia law. Ga. Code Ann. § 27-2537. As required, the review was conducted. In remanding, this Court did not order the original death sentence vacated. Rather, the Court vacated the judgment of the state appellate court dealing with sentence review. Therefore, on remand, the Supreme Court of Georgia was merely reconducting its appellate review of the death penalty. The state court did not reimpose the death sentence but merely reaffirmed the death sentence already imposed by the trial jury.

Petitioner contends he has somehow been harmed, without specifying the nature of the harm, because he was not allowed to submit additional briefs on remand. There is no requirement that the Supreme Court of Georgia allow such briefs filed or oral argument made. These are exclusively matters within the

province of the Supreme Court of Georgia and the rules of that court. That court merely conducted a portion of its appellate review in more detail, reconsidering its own judgment.

More importantly, Petitioner contends this Court should grant certiorari to consider whether the Supreme Court of Georgia construed Ga. Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. Petitioner seeks to discredit the Supreme Court of Georgia on remand by asserting that the state court merely found factual differences between this case and Godfrey. Yet the distinguishing of factual matters is a primary means of avoiding the arbitrary and capricious inflicting of the death penalty; only in considering the facts of each case can courts restrict the death penalty to those factual settings which justify it.

Contrary to Petitioner's assertions, since this Court decided Godfrey, the Supreme Court of Georgia has gone to great lengths to make its appellate review an elaborate and detailed process by examining each case, including the facts surrounding the offense, thoroughly. As this Court is aware, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), the court in detail defined and explained the seventh aggravating circumstance.

In considering Petitioner's death sentence on remand in light of Godfrey, the Supreme Court of Georgia found material differences between Godfrey and Collins which distinguished Collins' act from those cases in which the death penalty is not appropriate:

> . . . The evidence in this case clearly establishes that the victim was not related to the appellant. She was not threatening the appellant nor was she causing any emotional trauma to him. The appellant left the scene and attempted

in every manner to avoid prosecution for his crime.

As set out in the original opinion, the autopsy report showed that while the victim had died relatively instaneously from a massive head injury, she also had been raped and sodomized. The evidence shows she had been sexually abused by appellant and his two codefendants prior to death. [citations omitted].

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra. Serious sexual abuse may be found to constitute serious physical abuse. [Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980)]. A defendant who tortures the victim before killing the victim can be found to have a depraved mind. Hance v. State, supra.

Accordingly, this court holds that the present jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey that, beyond a reasonable doubt, the murder of the victim was of a type universally condemned by civilized society as "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." [citation omitted].

Collins v. State, ___Ga. ___, ___S.E.2d___(1980)[Case No. 33879, decision on remand, decided September 8, 1980].

Additionally, the Supreme Court of Georgia found that

> . . . This case is also of the type wherein the sentence of death rests only partially upon Ga. Code Ann. § 27-2534.1(b)(7). The jury returned a finding of two statutory aggravating circumstances. Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, supra, the Supreme Court of the United States was concerned exclusively with a sentence of death resting only upon Code & 27-2534.1(b)(7). Godfrey v. Georgia, 446 U.S.___(1980).
>
> Therefore, under our decisions, the death penalty may also be upheld upon § 27-2534.1(b)(2). [citations omitted].

Id. at 2.

Concerning this latter portion of the holding, Petitioner argues that the presence of a second aggravating circumstance cannot save the death penalty. Georgia's death penalty statute was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). This Court upheld Gregg's death penalty even though the jury had been allowed to impose a death penalty for armed robbery. Id. at 161-62. The Supreme Court of Georgia had ruled that the death penalty for armed robbery was disproportinate (Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974). Yet the fact the jury considered and imposed a death penalty for armed robbery did not require that the death penalty for murder be vacated.

The Supreme Court of Georgia has held that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if there still exists one aggravating circumstance. Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979). This Court has denied writs of certiorari in both of these cases. Burger v. Georgia, ___U.S.___, 27 Crim. L. Rptr. 4084 (1980); Gates v. Georgia, ___U.S.___, 26 Crim. L. Rptr. 4237 (1980). In denying a writ of certiorari in another Georgia death penalty case, this Court noted:

> The Georgia Supreme Court. . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of these aggravating circumstances is vulnerable . . . . [T]he Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions.

Westbrook v. Balkcom, ___U.S.___, 28 Crim. L. Rptr. 4087-88 (1980) (Stevens, J., concurring). As recognized, Georgia law is well-settled concerning the sufficiency of multiple aggravating circumstances. Of course, the effect of the failure of an aggravating circumstance need not be considered in this case because both aggravating circumstances were properly instructed, considered, and applied. Nevertheless, either circumstance standing alone is sufficient.

III. GEORGIA'S DEATH PENALTY LAW, UPHELD BY THIS COURT IN GREGG v. GEORGIA, 428 U.S. 153 (1976), IS CONSTITUTIONAL.

In the third reason asserted for justifying the granting of the writ of certiorari, Petitioner contends that Georgia's death penalty law, as applied, is arbitrary. The primary reason asserted is the fact that Petitioner's codefendant, William Durham, received a life sentence while Petitioner, a participant in the same crime, received a sentence of death. This very issue was raised in the Supreme Court of Georgia on direct appeal. That Court said:

> Collins argues that his death penalty should not be upheld inasmuch as Durham, his co-defendant, was given only a life sentence. We never have followed any simplistic rule that where one of multiple co-defendants is given a life sentence, none of the other co-defendants may be sentenced to death. Neither have we created a per se rule that where the triggerman does not receive the death sentence, it may not be imposed on other participants in the crime. Hall v. State, 241 Ga. 252 (244 SE2d833)(1978).
>
> The evidence does not establish Durham as the prime mover or sole perpetrator of this murder. Collins' car was used. He was the one who propositioned the victim and offered to take her home. After the victim stated she had a venereal disease to avoid the rape, he told

her if he caught the disease from her, he would harm her. He removed the seats from the car that were used in the rape of the victim and raped the victim first. He took the jack from the trunk of the car and followed Durham and the victim into the orchard. He had blood on his feet and admitted that he had hit the victim first and then had given the jack to Durham to complete the killing. His fingerprint was on the jack.

Under these circumstances we cannot say that Collins was a bystander or an unwilling or passive participant. On the contrary, the evidence clearly establishes that he was an active participant in all aspects of the rape and murder of the victim. Hill v. State, 237 Ga. 794 (229 SE2d 737)(1976).

243 Ga. at 299-300. Whether Petitioner subjectively believes his codefendant was "more culpable" than he is irrelevant. The fact that his codefendant received a life sentence while Collins received a death sentence is not even prima facie evidence that Georgia's death penalty law is being applied arbitrarily. Ga. Code Ann. § 27-2537(c)(3) requires the Supreme Court of Georgia to determine whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In its consideration of Collins' case, the supreme court did just that. Furthermore, it listed seventeen similar cases in which the death penalty was imposed. Petitioner, ignoring any mitigating evidence that may have been present in his codefendant's case and the myriad cases similar to his in which death sentences were imposed,

simply says that because his codefendant received a life sentence and he one of death the law is being arbitrarily applied. Since out of a total of these nineteen cases eighteen resulted in death penalties, it cannot be said that Petitioner's sentence is disproportionate simply because his codefendant did not also receive a death sentence in his separate trial. The more logical assumption is that there was insufficient evidence at the codefendant's trial to convince a jury beyond a reasonable doubt that the death sentence was appropriate, or that there was sufficient mitigating evidence to convince the sentencing jury to extend mercy to him.

Apparently, Petitioner is arguing for a return to standardized sentencing with no room for discretion; because the codefendant received a life sentence Petitioner should also receive a life sentence. That mechanical approach is the very means of sentencing which defendants of an earlier time challenged and which this Court condemned. In his brief, Petitioner states that "[t]he juxtaposition of the sentences of Durham and petitioner are not 'simply an assertion' but a concrete example of irrationality." (Petitioner's Brief, p. 26). Yet Petitioner does no more than make an assertion.

In view of the thorough review of similar cases by the Supreme Court of Georgia in its affirmance of Petitioner's death sentence, it is plain that that court is properly performing its statutory function. Additionally, this issue is raised for the first time in the petition to this Court for writ of certiorari and has never been presented to the courts of the State of Georgia. This Court does not decide issues raised for the first time in petitions for writs of certiorari. See, e.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969).

Petitioner also attacks the constitutionality of Ga. Code Ann. § 27-2534.1(b)(7), which reads:

> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

The jury found this circumstance to exist; [3/] additionally, the jury found as a second aggravating circumstance that the offense was committed while the defendant was engaged in the commission of rape. Ga. Code Ann. § 27-2534.1(b)(2). Therefore, the jury found two statutory aggravating circumstances to exist.

On direct appeal, Petitioner attacked the seventh aggravating circumstance as unconstitutionally vague. The Supreme Court of Georgia has addressed that same issue in other cases, as well as Petitioner's. Addressing this issue specifically in Harris v. State, 237 Ga. 718, 732, 230 S.E.2d 1 (1976), sentence vacated on other grounds, Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979), the court said:

> We recognize that there is a possibility of abuse of this statutory aggravating circumstance but we have been given the duty of determining (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2537(c)(2). This is a test separate and distinct from our duties specified in § 27-2537(c)(1) and (3).

[3/] The jury did not find that portion of the statute which involves aggravated battery to the victim.

> Indeed, if the similar cases test was to be limited to similar statutory aggravating circumstances, we would be limiting application of the statute to some common statutory aggravating circumstance that would have to appear in each case affirmed.
>
> Under our duty specified in Code Ann. § 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence.

Clearly, the Supreme Court of Georgia recognizes its duty under the law and has evidenced its intent to perform that duty properly.

Furthermore, the jury found a second aggravating circumstance to exist, to wit, that the murder was committed while the defendant was engaged in the commission of rape. Even if the seventh statutory aggravating circumstance were unconstitutional, and it is not, the evidence supported the jury's finding of another statutory aggravating circumstance, therefore the sentence would not be imparied. See, e.g., Stephens v. State, 237 Ga. 258, 261-62, 227 S.E.2d 261 (1976).

Having briefly recounted the facts of Petitioner's involvement in the crime and referred this Court to the decision of the Supreme Court of Georgia, Respondent need not address further Petitioner's argument that the second statutory aggravating circumstance is inapplicable because the victim was murdered a few feet and a few minutes removed from the location where she was raped.

As for Petitioner's argument that rape is no longer a capital felony under Georgia law, that assertion is incorrect insofar as the Supreme Court of Georgia has held specifically that rape, armed robbery and kidnapping are still capital felonies for the purpose of applying Ga. Code Ann. § 27-2534.1 (b)(2). Peek v. State, 239 Ga. 422, 432, 238 S.E.2d (1977). "Capital felony" is construed "in a generic sense to include those felonies which were capital crimes in Georgia at the time this section of our death penalty statute was enacted." Id. Furthermore, this Court has recognized the practice of using an offense (armed robbery) as a capital offense under the aggravating circumstance provision of Georgia law even though the death penalty can no longer be given for that particular offense. Coker v. Georgia, 433 U.S. 584, 599, n. 15 (1977).

Apologetically characterizing his offense as a mere "routine murder," Petitioner pleads that the death sentence is too severe in his case because his rape and murder of Delores Luster were not sufficiently aggravated, extreme, chilling, jarring or punishment-worthy. Respondent need only direct this Court's attention to the facts of the case establishing Petitioner's involvement.

Finally, Petitioner alleges inadequate representation by his trial counsel. The issue of the effectiveness or ineffectiveness of trial counsel is not properly before this Court since it has nowhere been presented to the courts of the State of Georgia. Tacon v. Arizona, supra; Cardinale v. Louisiana, supra.

CONCLUSION

No sufficient reasons having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Don A. Langham

DON A. LANGHAM
First Assistant
Attorney General

John C. Walden by H/C

JOHN C. WALDEN
Senior Assistant
Attorney General

Daryl A. Robinson

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

No. 80-5672

ROGER COLLINS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

REPLY TO OPPOSITION

MARSHALL W. KRAUSE,
KRAUSE, TIMAN, BASKIN, SHELL & GRANT
Wood Island, Suite 207
60 E. Sir Francis Drake Blvd.
Larkspur, CA 94939
Telephone: (415) 461-4100

Attorneys for Petitioner.

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REPLY TO OPPOSITION

I

THE CHALLENGED JURY INSTRUCTION MUST FALL UNDER SANDSTROM v. MONTANA

Many of the grounds upon which respondent urges this Court to distinguish Sandstrom v. Montana (1979) 442 U.S. 510, from petitioner's case have already been examined in the Sandstrom opinion. Respondent argues that instructions on the presumption of innocence and the burden of proof of the prosecution discharge the constitutional error created when the jury was instructed that it could presume criminal intent from the acts of the defendant. (R.T. 327-328.) But this Court has already handled this problem in footnote 7 of the Sandstrom opinion:

> The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must be proven beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt.

This court pointed out in Sandstrom that the common definition of "presume" as found in Webster's New Collegiate Dictionary (1974) is "to suppose to be true without proof." Perhaps even more damning to the respondent's argument is the definition of presumption given by the trial court to this jury:

> A presumption is a conclusion which the law draws from given facts. (R.T. 327.)

A "conclusion" is of course the final result or decision, a term of great consequence to a jury.

This Court in Sandstrom was very clear that allowing a jury to presume a vital element of the prosecution's case as a legal conclusion from other facts which were not rebutted is, and has historically been, to deprive a defendant of his constitutional right to require the government to prove its case beyond a reasonable doubt. The court stated at 61 L.Ed. 45:

> Sandstrom's jurors were told that "that law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory. [Citing cases]

This same thought was put in another way by this Court in Sandstrom at 61 L.Ed.2d 50:

> Upon finding proof of one element of the crime (causing death), and of facts sufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's action), Sandstrom's jurors could reasonbly have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," 397 U.S. at 364, and defendant was deprived of his constitutional rights as explicated in Winship.

Strangely, respondent insists that "the jury was instructed in unambiguous terms that the criminal intent may not be presumed." (Respondent's Brief, p. 5.) Yet on page 3 of respondent's brief the trial court's instruction on criminal intent is quoted:

> It [criminal intent] may be demonstrated by the acts and conduct of the defendant, it may be inferred from the proven circumstances or it may be presumed where it appears to be the necessary or probable consequence of the defendant's acts. [R.T. 328, emphasis added.]

This instruction is a repetition of the error at R.T. 327 presuming a person of sound mind and discretion to intend the natural and probable consequences of his acts and was in no way qualified by the trial judge. The fact that there were other instructions which the jury might have followed to obtain a correct view of the law is of no moment, as Sandstrom holds. (61 L.Ed.2d at 51.) The end result of the two instructions challenged here is that the jury, at best, received contradictory instructions on the State's burden to prove intent beyond a reasonable doubt.

II

THE GEORGIA SUPREME COURT FAILED TO EXAMINE THE ISSUE OF WHETHER THE JURY RECEIVED AN APPROPRIATELY NARROWING CONSTRUCTION OF AGGRAVATING CIRCUMSTANCE (7)

Contrary to respondent's argument, petitioner does not claim that this Court's decision in Godfrey v. Georgia (1980) 446 U.S.____, required the Supreme Court of Georgia to remand for a new jury sentencing. Petitioner's position is that the Georgia Supreme Court failed to examine the question of whether the jury was properly instructed on the sentencing issue, and that this re-examination was a part of the mandate of this Court when this case was previously remanded. Petitioner is constitutionally entitled to a properly instructed jury on the

issue of penalty even if the Georgia Supreme Court has appropriately fulfilled its responsibility in reviewing the issue of whether the penalty is valid. It is the jury which has the initial discretion in the matter and that jury must be instructed in a constitutionally authorized manner. Although, there may be no constitutional right to jury sentencing, Georgia procedure provides for such sentencing and it therefore must follow constitutional guidelines.

Respondent does not comment on the fact that the Georgia Supreme Court had earlier stated, in Gates v. State (1979) 244 Ga. 587, 261 S.E.2d 349, 357:

> "This defendant's jury was not charged on the meaning of this aggravating circumstance [(b)(7)] as it was intended by the legislature and has been interpreted by this Court."

III

SECTION (b)(7) DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS OF LAW

Respondent takes the same position now as the Georgia Supreme Court took when this case was last remanded to it. That is, as long as some factual distinctions may be found between this case and Godfrey, § (b)(7) can be constitutionally applied to petitioner. Neither the Georgia Supreme Court nor respondent wrestled with the difficult definitional problems created by the vague and broad words of § (b)(7). Most, if not all, murders are unique and have horrifying aspects. There must be a concrete means of distinguishing cases which fall within § (b)(7) and those which fall without it, although both involve first degree murder. Neither the Georgia Supreme nor respondent has made an attempt in this direction.

IV

THE DEATH PENALTY CANNOT BE UPHELD ON THE ALTERNATIVE GROUND OF AGGRAVATING CIRCUMSTANCE (2)

Respondent argues that Gregg v. Georgia (1976) 428 U.S. 153 defeats petitioner's argument on this point. The effect of the infirmity of one of several grounds for imposition of the death penalty was not specifically decided in Gregg. Petitioner does not know whether this point was even argued in Gregg. However, Gregg has as its main concern whether or not the death penalty is always a violation of the Eighth Amendment's prohibition of cruel or unusual punishments and whether the Georgia procedural scheme is adequate to meet constitutional standards. Neither of these points meets petitioner's argument.

It is true that in Westbrook v. Balkcom (1980) U.S. ___ (Nos. 79-6615 and 79-6704) Justice Stevens filed a special concurring opinion to the denial of certiorari which would allow the Georgia Supreme Court to sustain a death sentence if any of the aggravating circumstances were free of constitutional infirmity. Petitioner believes that the Court has not yet spoken on this issue and that it is an important one deserving full briefing and argument before decision for the reason mentioned on pages 21 through 24 of the Petition for Writ of Certiorari.

Respondent has no comment on petitioner's argument that the same crime, rape, cannot serve as the basis for the imposition of the felony-murder rule and as an aggravating circumstance, as held by the Supreme Court of North Carolina in State v. Cherry (1979) ____ N.C. ____ 257 S.E.2d 551, 567, 568.

V

PETITIONER'S SENTENCE IS ARBITRARILY DISPROPORTIONATE TO THAT OF HIS CO-DEFENDANT

The arbitrary discrimination petitioner complains of is not the decision of the jury in either his case or Durham's case. It is the arbitrariness of the Georgia Supreme Court in failing to reduce his sentence in the light of the sentence given to his co-defendant. Of course, the Georgia Supreme Court was fully cognizant of both sentences and discussed the facts of both in its opinion. Its decision only became arbitrary when it refused to make the sentences rational.

What the Georgia Supreme Court did is merely point out facts which tend to show the petitioner was not a bystander but was an active participant in the crime. However, it failed to compare these facts with the participation of Durham. Obviously, some comparison has to be made under this Court's decision in Gregg v. Georgia (1976) 428 U.S. 153 if the anticipated even-handed application of the Georgia statute is to be a reality. It was the duty of the Georgia Supreme Court not to decide whether petitioner was fully culpable but to decide whether he was so much more culpable than his co-defendant as to justify a death sentence in the face of the sparing of the life of his co-defendant. This duty was performed by the Georgia Supreme Court in Hall v. The State (1978) 241 Ga. 252, 244 S.E.2d 833, but ignored in petitioner's case.

VI

PETITIONER RECEIVED CONSTITUTIONALLY DEFICIENT ASSISTANCE OF COUNSEL BOTH AT HIS TRIAL AND ON HIS APPEAL TO THE GEORGIA SUPREME COURT

Respondent contents itself on this point by stating that it was not raised before the Georgia Supreme Court. When the Georgia Supreme Court engages in the practice, as it did in this case, of allowing appointed trial counsel to be appointed appellate counsel, we can hardly expect that appellate counsel

will be very critical of trial counsel. Evidently, respondent would have this Court accept the argument that the more inadequate counsel is on appeal, the more insulated from constitutional review will be the inadequacy of trial counsel.

Respondent nowhere denies that facts of great moment concerning petitioner and his defense were either kept from the jury entirely or presented to the jury at the most awkward and insulting time so as to contradict and mock this Court's holding in Woodson v. North Carolina (1976) 428 U.S. 280, 304 and Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 987 that a jury considering the death sentence must have an adequate picture of the defendant's character, background and motivation. Only defense counsel can be expected to perform this task. Petitioner's defense counsel deprived petitioner of his chance to not be the victim of an arbitrary death penalty decision. Now we ask that this Court make it clear to the nation that counsel in death penalty cases must actively seek and present to the jury the mitigating factors in their clients' backgrounds.

VII

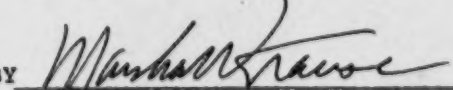
CONCLUSION

For the reasons stated this court should review the conviction and death penalty sentence of Roger Collins by issuing it writ of certiorari to the Supreme Court of Georgia.

DATED: December 23, 1980

Respectfully submitted,

KRAUSE, TIMAN, BASKIN, SHELL & GRANT

BY 

MARSHALL W. KRAUSE
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 1980, a copy of this Reply to Opposition was mailed, postage prepaid, to:

Daryl A. Robinson
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334